(2)

No. 95-182

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1995

TRIDENT ASSOCIATES LIMITED PARTNERSHIP,

Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in affirming the Bankruptcy Court Orders which dismissed the Chapter 11 petition under 11 U.S.C. § 1112(b) and lifted/annulled the automatic stay under 11 U.S.C. § 362(d)(1) because "cause" existed based upon its finding that the petition had been filed in bad faith?

LIST OF PARENT, SUBSIDIARY AND AFFILIATED CORPORATIONS OF RESPONDENT

Dormant Subsidiaries and Companies of which Respondent directly or indirectly has actual ownership (for its own account) of 10% through 99% of the total outstanding voting stock include the following:[1]

1038624 Ontario Inc.
161397 Canada Inc.
478077 Alberta Ltd.
810597 Ontario Inc.
810660 Ontario Inc.
Albany General Insurance Company Limited
Anthony's Holding Corporation
Blodgett Holdings, Inc.
Braelan Corp.
Briggs Holdings, Inc.
Briggs Plumbing Products, Inc.
Centennial Equities Corporation
Chart House Enterprises, Inc.
Cicero/Cermak Corporation
Cloverleaf Properties, Inc.
Cross & Brown Company of Georgia, Inc.
Cross & Brown Company of Maryland, Inc.
Cross & Brown Company of Missouri, Inc.
Cross & Brown Company of Ohio, Inc.
Dan River, Inc.
Eclipse Claim Services Inc.
Federal Street Financial Advisers, Inc.
First Health Associates, Inc.

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[1] Current as of December 31, 1994. If requested, an update of the list will be made available.

LIST OF PARENT, SUBSIDIARY AND AFFILIATED CORPORATIONS OF RESPONDENT – Continued

Frialator International, Limited
Genesis Seguros De Retiro, S.A.
Genesis Seguros Generales, Sociedad Anonima De Seguros Y Reaseguros
GS Blodgett Corporation
GS Blodgett Inc.
GS Blodgett International Ltd.
Interbroker, Correduria De Reaseguros, S.A.
Interstate Bakeries Corporation
Interstate Brands Corporation
Kolon-Met Life Insurance Company
Lincoln Group Holding Corp.
Luther's Bar-B-Q', Inc.
Magikitch'n, Inc.
Management and Risk Institute, Inc.
Mecco Holding, Inc.
Met Life Agricultural Limited Partnership
Met Life International Real Estate Equity Shares, Inc.
MetLife Agricultural Credit Corp.
MetLife Funding II, Inc.
MetLife General Insurance Agency of Ohio, Inc.
MetLife Healthcare Network of Eastern Pennsylvania
MetLife Healthcare Network of Northeast Florida
MetLife Healthcare Network of South Florida
MetLife Healthcare Network of Western Florida
MetLife Independent Financial Services Limited
MetLife Limited Partnership I
MetLife Portfolios, Inc.
Metric Institutional Apartment Fund II, L.P.
Metropolitan Financial Advisors Limited
Metropolitan Home Loans Limited
Metropolitan Life Insurance Services Limited
Metropolitan Lloyds Insurance Company of Texas
Metropolitan Plan Managers Limited
Metropolitan Structures

LIST OF PARENT, SUBSIDIARY AND AFFILIATED CORPORATIONS OF RESPONDENT – Continued

Metropolitan Structures, Inc.
Metropolitan Structures West, Inc. d/b/a MS Management Services
Mezzanine Investment Limited Partnership-2
Mezzanine Investment Limited Partnership-6
Mezzanine Investment Limited Partnership-9
Mezzanine Investment Limited Partnership-10
Morguard Investments Limited
MS Management Services, Inc.
National Electronic Information Corporation
Park Avenue Funding Corporation
Pitco Frialator, Inc.
Ralph C. Sutro, Co.
RB & W Corporation
Santander Met, S.A.
Seguros Genesis, S.A. (Mexico)
Seguros Genesis, S.A. (Spain)
Southern Health Plan Management, Inc.
Southwest Capital Company
SSRM Services, Inc.
The Metrahealth Companies, Inc.

TABLE OF CONTENTS

Page

Counter-Statement of Question Presented i

List of Parent, Subsidiary and Affiliated Corporations of Respondent ii

Table of Contents..... v

Table of Authorities vi

Response in Opposition to Petition for Writ of Certiorari..... 1

Counter-Statement of Opinions Below..... 1

Counter-Statement of Constitutional Provisions and Statutes Involved..... 2

Counter-Statement of the Case..... 3

Summary of Argument 5

Reasons for Denying the Writ 7

I. The Opinion Below Is Consistent With the Decisions of the United States Courts of Appeal And This Court And Does Not Raise Important Questions Calling For The Exercise Of This Court's Supervisory Powers..... 7

II. Independent Grounds Under 11 U.S.C. § 362(d)(2) Exist To Justify The Relief Granted By The Bankruptcy Court Which Are Not Subject To The Petition For Writ Of Certiorari.... 12

III. The Issues For Which Petitioner Seeks Review By This Court Are Moot..... 13

Conclusion 16

TABLE OF AUTHORITIES

Page

Cases

In re Arnold, 806 F.2d 937 (9th Cir. 1986) 9

In re Barrett, 964 F.2d 588 (6th Cir. 1992) 9

Basin Electric Power Cooperative v. Midwest Processing Co., 769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986) 9

Berkemer v. McCarty, 468 U.S. 420 (1984) 13

Butner v. United States, 440 U.S. 48 (1979) 14

Carolin Corp. v. Miller, 886 F.2d 693 (4th Cir. 1989) 9

In re Charfoos, 979 F.2d 390 (6th Cir. 1992) 9, 11

In re Coastal Cable T.V., Inc., 709 F.2d 762 (1st Cir. 1983) 9

Detroit Trust Co. v. George, 247 N.W. 697 (Mich. 1933) 15

In re Gonic Realty Trust, 909 F.2d 624 (1st Cir. 1990) 8

Gordon Grossman Building Co. v. Elliott, 171 N.W.2d 441 (Mich. 1969) 15

In re Humble Place Joint Venture, 936 F.2d 814 (5th Cir. 1991) 9

In re Laguna Associates Limited Partnership, 30 F.3d 734 (6th Cir. 1994) 9

In re Lashley, 825 F.2d 362 (11th Cir. 1987), *cert. denied*, 484 U.S. 1075 (1988) 15

In re Little Creek Development Co., 779 F.2d 1068 (5th Cir. 1986) 9

TABLE OF AUTHORITIES – Continued

Page

In re Madison Hotel Associates, 749 F.2d 410 (7th Cir. 1984) 9

Manhattan King David Restaurant Inc. v. Levine, 163 B.R. 36 (S.D.N.Y. 1993) 8

Markstein v. Massey Associates, Ltd., 763 F.2d 1325 (11th Cir. 1985)..... 15

In re Matos, 790 F.2d 864 (11th Cir. 1986)..... 14

In re Natural Land Corp., 825 F.2d 296 (11th Cir. 1985)..... 9

In re Onouli-Kona Land Co., 846 F.2d 1170 (9th Cir. 1988)..... 14

In re Phoenix Piccadilly, Ltd., 849 F.2d 1393 (11th Cir. 1988) 9

In re Reichert, 138 B.R. 522 (Bankr. W.D. Mich. 1992)..... 8

In re Schriock Construction, Inc., 167 B.R. 569 (Bankr. D.N.D. 1994)..... 8

In re Sewanee Land, Coal & Cattle, Inc., 735 F.2d 1294 (11th Cir. 1984)..... 14

In re Sonnax Industries, Inc., 907 F.2d 1280 (2d Cir. 1990)..... 9

In re Sullivan Central Plaza, I, Ltd., 914 F.2d 731 (5th Cir. 1990) 15

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992)..... 5, 6, 7, 10, 12

Toibb v. Radloff, 501 U.S. 157 (1991)..... 5, 6, 7, 10

TABLE OF AUTHORITIES – Continued

Page

United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988) ..6, 13

In re Universal Life Church, Inc., 127 B.R. 453 (E.D. Cal. 1991), *aff'd*, 965 F.2d 777 (9th Cir. 1992) 8

In re Wieseler, 934 F.2d 965 (8th Cir. 1991)..... 9

Youakim v. Miller, 425 U.S. 231 (1976)..... 13

In re Zick, 931 F.2d 1124 (6th Cir. 1991) 9, 11

STATUTES

11 U.S.C. § 109.....5, 8, 11

11 U.S.C. § 109(d) 10

11 U.S.C. § 362..... 2

11 U.S.C. § 362(d) 2, 5, 8, 10, 11, 15

11 U.S.C. § 362(d)(1).....2, 3, 4, 12

11 U.S.C. § 362(d)(2)..... *passim*

11 U.S.C. § 362(d)(3)(B)..... 12

11 U.S.C. § 362(g) 3, 6, 12

11 U.S.C. § 522(l)..... 10

11 U.S.C. § 1112(b) ..... *passim*

11 U.S.C. § 1112(c) 2

MICH COMP. LAWS ANN. § 600.3240 (West 1995)..... 14

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

Fed. R. App. Pro. 35..... 5

Fed. R. App. Pro. 40..... 5

Supreme Court Rule 14.1(a)..... 12

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Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Metropolitan Life Insurance Company, respectfully prays that the Petition for Writ of Certiorari from the May 1, 1995 opinion and Judgment of the United States Court of Appeals for the Sixth Circuit be denied by this Court.

COUNTER-STATEMENT OF OPINIONS BELOW

The opinion and order cited and attached at 17a of Petitioner's Appendix to its Petition for Writ of Certiorari

is not the opinion and order referred to in the text, but rather another opinion and order issued subsequently by the United States District Court for the Eastern District of Michigan in other matters raised in the Bankruptcy Court, which are not the subject of the appeal to the United States Court of Appeals for the Sixth Circuit. The opinion and order of the United States District Court for the Eastern District of Michigan affirming the decision of the Bankruptcy Court, from which appeal to the United States Court of Appeals for the Sixth Circuit was taken and as to which Petitioner's Petition for Writ of Certiorari is sought, is not reported, and is appended hereto. (1a).

COUNTER-STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED[2]

11 U.S.C. § 362 provides in relevant part as follows:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –
>
> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
> >
> > (2) with respect to a stay of an act against property under subsection (a) of this section, if -

[2] Petitioner has included 11 U.S.C. § 1112(b) in its Brief, but has incorrectly referred to this statute as 11 U.S.C. § 1112(c).

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

* * *

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section –

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

COUNTER-STATEMENT OF THE CASE

Petitioner filed a voluntary petition under Chapter 11 of the Bankruptcy Code on June 22, 1993. Metropolitan Life Insurance Company, Respondent, filed two motions (the "Motions") to seek relief from the bankruptcy and to complete the foreclosure sale of real property, known as the Tri Atria Office Building, Petitioner's sole asset (the "Property"). Respondent sought to dismiss the bankruptcy petition under 11 U.S.C. § 1112(b) for "cause" based upon the petition having been filed in bad faith. Respondent also sought to lift and annul the automatic stay under 11 U.S.C. §§ 362(d)(1) and (2) contending that (i) "cause" existed to lift and annul the automatic stay under 11 U.S.C. § 362(d)(1) because the petition had been filed in bad faith, and (ii) Petitioner did not have any

equity in the Property, and the Property was not necessary to an effective reorganization under 11 U.S.C. § 362(d)(2).

The Bankruptcy Court held a hearing on the Motions on July 15, 1993. By that time, Petitioner had undertaken the following actions: (i) filed a disclosure statement and a plan of reorganization, (ii) stipulated that Respondent owned rents derived from the Property (the "Rents") based upon Respondent's prepetition exercise of its assignment of rents, (iii) stipulated that it did not have any equity in the Property, and (iv) stipulated to the authenticity and admissibility of all of the loan documents and other documents filed by Respondent in support of the Motions. Respondent also filed extensive objections to Petitioner's disclosure statement and plan of reorganization.

The Bankruptcy Court found that "cause" existed to dismiss the petition under 11 U.S.C. § 1112(b) and to lift/annul the automatic stay under 11 U.S.C. § 362(d)(1) because the petition had been filed in bad faith. In addition, the Bankruptcy Court also held that the automatic stay was to be lifted and annulled under 11 U.S.C. § 362(d)(2) because (i) Petitioner did not have any equity in the Property, a fact stipulated to by Petitioner; and (ii) there was no reasonable possibility of a successful reorganization within a reasonable time period based upon the Court's finding that Petitioner's plan was not feasible or facially confirmable. 176 B.R. 16, 19 (Bankr. E.D. Mich. 1993).

The decisions of the Bankruptcy Court were affirmed by the United States District Court for the Eastern District

of Michigan on November 19, 1993. (1a). The Court of Appeals for the Sixth Circuit affirmed the Bankruptcy Court's decisions on May 1, 1995. 52 F.3d 127 (6th Cir. 1995).

The Court of Appeals for the Sixth Circuit denied a petition for rehearing and a suggestion for rehearing *en banc* filed by Petitioner under Fed. R. App. Pro. 35 and 40. Subsequently, the Court of Appeals denied Petitioner's motion to stay issuance of the mandate. Once the mandate was issued by the United States Court of Appeals for the Sixth Circuit on June 2, 1995, Respondent recorded the Sheriff's Deed.

SUMMARY OF ARGUMENT

Petitioner has demonstrated no reason to grant a writ of certiorari. It has not shown that the decision of the United States Court of Appeals for the Sixth Circuit conflicts with the decision of any other circuit or that the case involves an important question of federal law which has not been, but should be, settled by this Court. Nor has it shown that the courts below departed from accepted judicial practice.

Petitioner argues that the decision below conflicts with the decisions of this Court in *Toibb v. Radloff*, 501 U.S. 157 (1991) and *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) by implying "good faith" as a requirement for a Chapter 11 debtor to file a petition under 11 U.S.C. § 109. The Sixth Circuit properly addressed the case on the basis of 11 U.S.C. §§ 362(d) and 1112(b), which authorize courts to lift and annul the automatic stay and to dismiss a

bankruptcy case for "cause." The Sixth Circuit considered all of the facts and held, on the basis of the totality of facts and circumstances, that requisite cause existed to justify the relief granted by the Bankruptcy Court. Petitioner has not contended and cannot demonstrate that the Sixth Circuit erred in this ruling. Bad faith was amply demonstrated through a pattern of egregious facts and pernicious conduct by Petitioner. Petitioner has given this Court no reason to grant its Petition for Writ of Certiorari.

The *Taylor* and *Toibb* decisions do not apply to the facts of this case because "cause" is an express statutory element contained in the Bankruptcy Code sections interpreted below. In both *Taylor* and *Toibb*, this Court was interpreting very specific statutory language, and rejected attempts to engraft extra requirements into the language when a plain reading of the statutes did not create such requirements. Neither of the statutory provisions addressed by this Court in *Taylor* or *Toibb* contained the term "cause," which is undefined, and therefore, requires a court to analyze and interpret information and reach a conclusion based on the totality of facts and circumstances.

Secondly, independent grounds under 11 U.S.C. § 362(d)(2) exist to justify the relief granted by the Bankruptcy Court. Petitioner stipulated that there was no equity in the Property, and consequently, the burden shifted to Petitioner pursuant to 11 U.S.C. § 362(g) to demonstrate that the Property was necessary for an effective reorganization. Petitioner failed to sustain this burden, and the court concluded that Petitioner's plan was not feasible or facially confirmable. The Sixth Circuit's ruling is consistent with this Court's ruling in *United*

Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988). Furthermore, Petitioner failed to preserve this issue for appeal. Because separate independent grounds exist to justify the relief granted under Section 362(d)(2), which will not change the ultimate result of this case, there is no reason for this Court to consider granting the Petition for Writ of Certiorari.

Lastly, Petitioner failed to secure a stay of proceedings pending appeal. Once the Sixth Circuit issued the mandate, Respondent recorded the Sheriff's Deed. Consequently, Petitioner is left only with a limited right to redeem the Property during the redemption period, which will terminate on December 2, 1995. There is no applicable legal theory or precedent indicating that the Court has power to rescind the foreclosure sale. The redemption period may not be retroactively stayed, extended or abridged by the courts without contravening state law. Therefore, the Court cannot grant effective relief in this matter.

REASONS FOR DENYING THE WRIT

I.

The Opinion Below Is Consistent With The Decisions Of The United States Courts Of Appeal And This Court And Does Not Raise Important Questions Calling For The Exercise Of This Court's Supervisory Powers.

Petitioner contends that the opinion below conflicts with the decisions of this Court in *Toibb v. Radloff, supra* and *Taylor v. Freeland & Kronz, supra* by implying "good

faith" as a requirement for a Chapter 11 debtor to file a petition under 11 U.S.C. § 109. Petitioner is incorrect because (i) the relief granted by the Bankruptcy Court was not premised on 11 U.S.C. § 109, but rather on the basis of 11 U.S.C. §§ 362(d) and 1112(b); (ii) the opinion is consistent with the decisions of all the federal courts of appeal which have ruled on this issue; and (iii) the decisions of this Court relied upon by Petitioner do not apply or support the result sought by Petitioner.

Section 362(d) allows a bankruptcy court to lift and/or annul the automatic stay for "cause." Section 1112(b) allows a bankruptcy court to dismiss a Chapter 11 petition for "cause." Neither of these sections define "cause," and therefore, its meaning is left to the interpretation of the courts. *In re Universal Life Church, Inc.*, 127 B.R. 453, 455 (E.D. Cal. 1991), *aff'd*, 965 F.2d 777 (9th Cir. 1992); *Manhattan King David Restaurant Inc. v. Levine*, 163 B.R. 36, 40 (S.D.N.Y. 1993). It is clear, however, that "cause" is not limited to the list of factors specifically enumerated in each of the Bankruptcy Code provisions. *In re Gonic Realty Trust*, 909 F.2d 624, 626 (1st Cir. 1990); *In re Schriock Construction, Inc.*, 167 B.R. 569, 574-5 (Bankr. D.N.D. 1994); *In re Reichert*, 138 B.R. 522, 523 n.1 (Bankr. W.D. Mich. 1992).

All of the federal courts of appeal which have addressed the restated question presented have uniformly concluded that a debtor's bad faith may constitute "cause" under both of these provisions based upon an analysis and review of the totality of facts and circumstances.

1st Circuit:	*In re Coastal Cable T.V., Inc.*, 709 F.2d 762 (1st Cir. 1983).
2d Circuit:	*In re Sonnax Industries, Inc.*, 907 F.2d 1280 (2d Cir. 1990).
4th Circuit:	*Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989).
5th Circuit:	*In re Little Creek Development Co.*, 779 F.2d 1068 (5th Cir. 1986); *In re Humble Place Joint Venture*, 936 F.2d 814 (5th Cir. 1991).
6th Circuit:	*In re Laguna Associates Limited Partnership*, 30 F.3d 734 (6th Cir. 1994); *In re Charfoos*, 979 F.2d 390 (6th Cir. 1992); *In re Barrett*, 964 F.2d 588 (6th Cir. 1992); *In re Zick*, 931 F.2d 1124 (6th Cir. 1991).
7th Circuit:	*In re Madison Hotel Associates*, 749 F.2d 410 (7th Cir. 1984).
8th Circuit:	*In re Wieseler*, 934 F.2d 965 (8th Cir. 1991); *Basin Electric Power Cooperative v. Midwest Processing Co.*, 769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986).
9th Circuit:	*In re Arnold*, 806 F.2d 937 (9th Cir. 1986).
11th Circuit:	*In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393 (11th Cir. 1988); *In re Natural Land Corp.*, 825 F.2d 296 (11th Cir. 1985).

This Court has also recognized that the Bankruptcy Code gives courts substantial discretion to dismiss a

Chapter 11 case under 11 U.S.C. § 1112(b) for "cause." *Toibb v. Radloff*, 501 U.S. at 165. The plain language of these Code provisions envisioned that the courts would be given discretion to determine those facts and circumstances which would provide the requisite cause to grant relief under 11 U.S.C. §§ 362(d) and 1112(b).

Nevertheless, Petitioner contends that *Taylor* and *Toibb* have overturned these circuit court decisions which have held that a debtor's bad faith constitutes cause to dismiss the petition and/or to lift and annul the automatic stay. Petitioner is wrong. In both *Taylor* and *Toibb*, this Court was dealing with very specific statutory language. *Toibb* addressed the statutory requirements regarding eligibility to file a Chapter 11 proceeding under 11 U.S.C. § 109(d), while *Taylor* dealt with the obligations of a debtor to list property in the bankruptcy schedule as exempt pursuant to 11 U.S.C. § 522(l). In both of these cases this Court rejected attempts to engraft extra requirements into the language when a plain reading of the statutes did not create such requirements. In contrast to the statutory provisions involved in the restated question presented, however, neither of those statutory provisions contained terms such as "cause" which must be subject to judicial scrutiny and interpretation. As the United States Court of Appeals concluded below:

> It is a very different argument to say that "bad faith" cannot, as a matter of law, constitute "cause" than to say that § 109 does not require good faith. Neither the holding of *Taylor* nor *Toibb* is broad enough to achieve the result for which Trident Associates argues.

52 F.3d at 131. Petitioner has mischaracterized the underlying issues in the stated question and failed to recognize the applicable Code provisions. Instead, Petitioner prefers to ignore the actual facts of the case and switch to a hypothetical case involving an order requiring good faith under 11 U.S.C. § 109, which, as correctly found by the Sixth Circuit, is something entirely different.

Petitioner suggests that the circuit courts have established a so-called good faith litmus test to deprive real estate debtors bankruptcy relief. The rulings of all the circuit courts of appeal are not before this Court: only the ruling in this case is in question! This argument is also specious because the only issue before this Court is whether the opinions below are justified under a plain reading of the statute. First, the decisions below equating "bad faith" with "cause" have not been limited solely to real estate debtors. *See, e.g., In re Charfoos, supra; In re Zick, supra.* The courts of appeal uniformly hold that bad faith may constitute "cause," based upon a review of the totality of facts and circumstances and pursuant to a plain reading of the statute, to justify the relief granted by these courts. From a review of the facts of each of these appellate decisions, bad faith was amply demonstrated through a pattern of egregious facts and conduct by debtors, evidencing the requisite "cause" to justify the relief granted by the courts. Similar egregious facts were found by the court below.

Lastly, as part of the recent bankruptcy amendments, Congress has not altered either Section 362(d) or Section 1112(b) of the Code as relates to "cause." In fact, contrary to Petitioner's contention, Congress has imposed additional limitations to the rules governing real estate

debtors under the Bankruptcy Reform Act of 1994, Public Law 103-314, Section 218 (single asset real estate), by requiring the commencement of monthly payments to secured creditors "in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate." 11 U.S.C. § 362(d)(3)(B).

II.

Independent Grounds Under 11 U.S.C. § 362(d)(2) Exist To Justify The Relief Granted By The Bankruptcy Court Which Are Not Subject To The Petition For Writ Of Certiorari.

In addition to finding "cause" to lift and annul the automatic stay under 11 U.S.C. § 362(d)(1), the Bankruptcy Court also lifted and annulled the automatic stay pursuant to 11 U.S.C. § 362(d)(2) because Petitioner had no equity in the Property and the Property was not necessary to an effective reorganization. Prior to the hearing, Petitioner had stipulated that there was no equity in the Property. Consequently, the burden of proof shifted to Petitioner under 11 U.S.C. § 362(g) to demonstrate that the Property was necessary for an effective reorganization. Petitioner failed to sustain this burden.

The Bankruptcy Court concluded that Petitioner's plan was not feasible or facially confirmable. 176 B.R. at 19. Having failed to preserve this issue for appellate review, Petitioner has waived this issue, and therefore, it is not subject to consideration by this Court. Supreme Court Rule 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court"). *See also Taylor v. Freeland & Kronz*, 503 U.S. at

646 (quoting from *Youakim v. Miller*, 425 U.S. 231 (1976) (*per curium*) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]")). Furthermore, there are no "unusual circumstances" that warrant the Court addressing this issue at this time. *Berkemer v. McCarty*, 468 U.S. 420, 433 n.38 (1984).

The Bankruptcy Court's ruling under 11 U.S.C. § 362(d)(2) is consistent with this Court's rulings and the plain meaning of the statute. *See, e.g., United Savings Association of Texas v. Timbers of Inwood Forest*, 484 U.S. at 376 n.2 (1988). Petitioner did not and could not demonstrate that there was a reasonable possibility of a successful reorganization within a reasonable time period, particularly when Petitioner stipulated that Respondent, by virtue of its exercise of the Assignment of Rents, owned all the income derived from the Property.

Separate independent grounds exist under 11 U.S.C. § 362(d)(2) to justify the relief granted by the Bankruptcy Court. Because the ultimate result of this case will not be altered by consideration of the issues raised by Petitioner in the Petition for Writ of Certiorari, there is no reason for this Court to grant the Writ.

III.

The Issues For Which Petitioner Seeks Review By This Court Are Moot.

The United States Court of Appeals for the Sixth Circuit denied Petitioner's Motion for Stay of the Mandate and issued the mandate on June 2, 1995. Respondent promptly recorded the Sheriff's Deed on that day, thereby commencing the running of the six month redemption

period under Michigan law. Petitioner contends, despite completion of the foreclosure sale and recordation of the deed, that this case is still ripe for determination by this Court. Petitioner has cited various cases to justify retention of jurisdiction; however, they do not apply to the facts of this case. None of these cases dealt with issues relating to sales of real property, foreclosure or redemption.

Petitioner failed to secure a stay of proceedings during the pendency of this appeal or prior to the recordation of the Sheriff's Deed for the purpose of maintaining the status quo, and therefore, Petitioner is left only with its right to redeem the Property during the redemption period. State law determines Petitioner's limited interest in the Property irrespective of Petitioner's bankruptcy filing. *Butner v. United States*, 440 U.S. 48 (1979). Under Michigan law, Petitioner's right of redemption will terminate during the pendency of this appeal, on December 2, 1995, and thereby vest title to the Property in Respondent. MICH. COMP. LAWS ANN. § 600.3240 (West 1995).

Petitioner may argue that the mere existence of a right of redemption cures any condition of mootness. Although Petitioner has a limited right to re-acquire the Property through redemption under state law, it is well settled that once the redemption period expires and no stay pending appeal is in existence, the appeal is moot. *In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1173 (9th Cir. 1988); *In re Matos*, 790 F.2d 864, 865 (11th Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294, 1296 (11th Cir. 1984).

The right to redeem within the respective foreclosure statutes can neither be retroactively stayed, extended nor abridged by the courts without contravening state law. *Gordon Grossman Building Co. v. Elliott*, 171 N.W.2d 441, 444 (Mich. 1969); *Detroit Trust Co. v. George*, 247 N.W. 697, 697 (Mich. 1933); *In re Lashley*, 825 F.2d 362, 364 (11th Cir. 1987), *cert. denied*, 484 U.S. 1075 (1988); *Markstein v. Massey Associates, Ltd.*, 763 F.2d 1325, 1327 (11th Cir. 1985). As the court stated in *Gordon Grossman Building Co.*:

> We accept as a general rule that the right to redeem under present statutes is a legal right and can neither be enlarged nor abridged by the courts. See *Detroit Trust Co. v. George* (1933), 262 Mich 362; *Drysdale v. P.J. Christy Land Co.* (1929) 245 Mich 184.

171 N.W. 2d at 444. Consequently, the Court cannot grant effective relief to Petitioner even if it prevails on the merits of the appeal, and therefore, the issue presented by Petitioner is moot.

Nevertheless, Petitioner contends that the transaction can be unraveled in order to divest Respondent of title to the Property. This argument begs the question. There is no precedent requiring property to be reconveyed under these circumstances. *See Markstein, supra* at 1327 ("When the bankruptcy court sets aside an automatic stay pursuant to Section 362(d), and the debtor fails to obtain a stay pending appeal with the result that the property is sold to a creditor at foreclosure, a court is powerless to rescind the sale on appeal"); *In re Sullivan Central Plaza, I, Ltd.*, 914 F.2d 731, 736 (5th Cir. 1990) ("[T]o grant adequate relief the court would be required to reverse the foreclosure transaction, which the court is unable to do").

The foreclosure sale has been concluded in compliance with applicable state law procedures, and the Sheriff's Deed has been properly recorded by Respondent.[3] Petitioner simply did not act in a timely fashion to preclude Respondent from recording the deed. Therefore, the Court should not exercise its powers of limited discretionary review in a matter where any relief granted will be futile and moot unless Petitioner redeems from foreclosure.

CONCLUSION

The decisions rendered below are consistent with the eight federal circuit courts of appeal which have addressed the issue of bad faith of a debtor as providing "cause" to dismiss the bankruptcy petition and to lift and annul the automatic stay. The trier of fact found the facts and circumstances of this case to demonstrate egregious and pernicious conduct on the part of Petitioner, which amply justified the relief granted by the court. The applicable Code provisions are clear and unambiguous on their face providing "cause" as a basis for the relief granted by the courts. Separate and independent grounds exist to justify the relief granted by the Bankruptcy Court. The Code provisions have been properly construed and

[3] In a subsequent case between the same parties known as *Trident Associates Limited Partnership v. Metropolitan Life Insurance Company*, Case No. 95-CV-72270-DT, the United States District Court for the Eastern District of Michigan issued an unpublished opinion holding the foreclosure sale was completed. A copy of the opinion is contained in the Appendix at 7a.

there is no reason to grant the Petition for Writ of Certiorari. Respondent, Metropolitan Life Insurance Company, respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: August 24, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:
Trident Associates Limited Partnership, a Michigan Limited Partnership,

Debtor,

_____ /

Trident Associates Limited Partnership, a Michigan Limited Partnership, d/b/a Beztak of Tri Atria Limited Partnership,

Appellant,

vs.

Metropolitan Life Insurance Company,

Appellee.

_____ /

Case No. 93-CV-72996-DT

HON. BARBARA K. HACKETT

ORDER AFFIRMING DECISIONS OF BANKRUPTCY COURT

Debtor-appellant appeals the bankruptcy court's orders dismissing his bankruptcy petition and lifting the automatic stay. The bankruptcy court dismissed the petition and lifted the stay based upon its factual determination that the petition had been filed in bad faith. For the reasons set forth below, the bankruptcy court's decisions shall be affirmed.

FACTUAL BACKGROUND

Debtor-appellant's primary asset is approximately 13 acres of real property on which an office building known as Tri Atria is located. The property is subject to a $23 million mortgage held by Metropolitan Life Insurance Company (Metlife). Debtor defaulted on the note by failing to pay the 1990 winter real estate taxes and the 1992 real property taxes. On May 4, 1993, Metlife recorded a notice of default with the Oakland County Register of Deeds. On May 10, 1993, the security property was sold at a tax sale to Metlife. As a result of the entry of default, Metlife was entitled to receive the rents from the security property. On June 15, 1993, Metlife served notice to tenants of the Tri Atria office complex to pay rents to Metlife. After the entry of default, Metlife also began foreclosure by advertisement proceedings on May 14, 1993.

After foreclosure proceedings had begun and on the eve of filing the bankruptcy petition, the debtor partnership was restructured without the consent of Metlife as required by the loan documents. Debtor filed its bankruptcy petition on June 22, 1993, the same day that the foreclosure sale occurred. Metlife filed motions to lift the automatic stay and dismiss the bankruptcy petition on the grounds that it had been filed in bad faith. On July 9, 1993, a hearing on the motions was held and the bankruptcy court made a factual finding that the petition had been filed in bad faith and granted the motions lifting the stay and dismissing the case.

STANDARD OF REVIEW

The decision to lift the automatic stay is within the discretion of the bankruptcy court. 11 U.S.C. § 362 (d). This court must apply an abuse of discretion standard in reviewing the bankruptcy court's decision to lift the stay. *Stephens Indus. Inc. v. McClung*, 789 F.2d 386, 391 (6th Cir. 1986). This court applies a "clearly erroneous" standard in reviewing the bankruptcy court's factual finding that the petition was filed in bad faith. *In Re Charfoos*, 979 F.2d 390, 392 (6th Cir. 1992).

BAD FAITH STANDARD

The Sixth Circuit has stated that bad faith must be "evaluated under flexible and multiple standards." *In Re Charfoos*, 979 F.2d at 393. The Sixth Circuit has cautioned that dismissal for lack of good faith:

> should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence.

In Re Zick, 931 F.2d 1124, 1129 (6th Cir. 1991). Relevant factors to consider when determining whether a Chapter 11 petition to reorganize has been filed in good faith are "whether the debtor has any assets, whether the debtor had an ongoing business to reorganize, and whether there was a reasonable probability of a plan being proposed and confirmed." *Matter of Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir. 1985). Ultimately, the decision to dismiss a bankruptcy petition for bad faith must

be determined by the "totality of the circumstances." *In Re Caldwell,* 851 F.2d 852, 860 (6th Cir. 1988).

DISCUSSION

In this case, the bankruptcy court determined that the petition was filed in bad faith for the following reasons:

(1) there was no likelihood that debtor's plan could be funded or confirmed and no indication that it would work;

(2) debtor reorganized its corporate form on the eve of filing the bankruptcy petition without the consent of Metlife as required by the loan agreement; and,

(3) debtor "engaged in a pattern of shadow boxing"[1] with Metlife by representing that it was not pursuing filing a Chapter 11 petition when in fact it was.

Based upon a careful review of the record and the arguments set forth in the parties' briefs, the court determines that the bankruptcy court's finding of debtor-appellant's bad faith in filing its Chapter 11 petition was not clearly erroneous.

Debtor argues that the bankruptcy court erred by deciding the issue of bad faith based solely upon arguments of counsel. The record shows that the bankruptcy court did not rely solely upon counsels' arguments but

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[1] Transcript at p.51.

relied on substantial documentary evidence.[2] Debtor also argues that the record does not support a finding of bad faith. This court disagrees. The facts in this case supporting a finding of bad faith are almost identical to the facts cited in *In Re Laguna Assoc. Ltd. Partnership*, 147 B.R. 709 (Bankr. E.D. Mich. 1992). In addition, the bankruptcy court followed Sixth Circuit precedent when it found bad faith existed based upon the totality of the circumstances including the fact that there was no reasonable probability of debtor's plan being confirmed. *Matter of Winshall Settlor's Trust, supra; In Re Caldwell, supra.*

Finally, debtor argues that the bankruptcy court's orders were premature because debtor was moving rapidly towards confirmation and should have been allowed time to amend its reorganization plan under the Supreme Court's holding in *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988). That case, however, did not involve a bankruptcy petition filed in bad faith. Furthermore, the bankruptcy court found that debtor could not fund its reorganization plan and that on its face the plan was not capable of confirmation. Because the bankruptcy court's finding of bad faith was not clearly erroneous,

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[2] In addition to documentary evidence, debtor admitted on the record that debtor had restructured its legal form on the eve of bankruptcy without the required consent of Metlife. Transcript at pp. 33-34.

IT IS ORDERED that the bankruptcy court's dismissal of appellant's petition and lifting of the automatic stay hereby are AFFIRMED.

/s/ Barbara K. Hackett
BARBARA K. HACKETT
United States District Judge

Dated: November 19, 1993.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TRIDENT ASSOCIATES
LIMITED PARTNERSHIP, d/b/a
Tri Atria Office Building,

Plaintiff,

vs.

Case No.
95-CV-72270-DT

METROPOLITAN LIFE
INSURANCE COMPANY, a
New York corporation,

HON. BARBARA
K. HACKETT

Defendant.

_____ /

ORDER DENYING PLAINTIFF'S MOTION TO REMAND AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, TO SET ASIDE NOTICE OF LIS PENDENS, AND FOR ATTORNEY FEES

This is the fourth lawsuit that plaintiff Trident Associates Limited Partnership (Trident) or one of its corporate predecessors has filed in an attempt to prevent defendant from completing the foreclosure of the Tri Atria office complex. Defendant Metropolitan Life Insurance (MetLife) removed this lawsuit from state court. Plaintiff filed a motion to remand. MetLife opposes the motion to remand and has filed a motion for summary judgment, to set aside Notice of Lis Pendens, and for costs, expenses and attorney fees incurred in defending against this alleged frivolous and vexatious litigation. For the reasons stated below, plaintiff's motion to remand

shall be denied and defendant's motion shall be granted in its entirety.

BACKGROUND

Plaintiff filed this declaratory judgment action seeking a ruling that the foreclosure sale of the Tri Atria office complex was void because of the filing of plaintiff's bankruptcy petition. Plaintiff's complaint also sought an injunction enjoining MetLife from recording the sheriff's deed. MetLife recorded its sheriff's deed on June 2, 1995, rendering plaintiff's request for injunctive relief moot.

This lawsuit arises out of MetLife's attempts to foreclose its mortgage in the Tri Atria office complex and the 13 acres on which it is located in Farmington, Michigan. On October 13, 1987, MetLife loaned $23 million to Trident's predecessor, Tri Atria Company (Tri Atria). Tri Atria later reorganized as a new entity, Beztak of Tri Atria Limited Partnership. Beztak of Tri Atria defaulted on the mortgage by failing to pay 1990 and 1992 property taxes. Thus, under the terms of the mortgage, MetLife accelerated the debt effective May 1, 1993. On May 10, 1993, the Oakland County Treasurer conducted a forced sale of its tax lien interest for the 1990 winter taxes. MetLife purchased this lien for $314,066.

On May 14, 1993, MetLife advertised notice of its proposed foreclosure sale of the property. The foreclosure sale was scheduled for June 15, 1993. On May 21, 1993, MetLife filed suit against Beztak of Tri Atria seeking appointment of receiver, declaratory and injunctive relief, and recovery of converted funds. That lawsuit was

assigned to this judge. The foreclosure sale was postponed until June 22, 1993, so that the court could hold a hearing on the motion for appointment of receiver and preliminary injunction. This court denied MetLife's motion for appointment of receiver and preliminary injunction and instructed the parties to continue negotiations to resolve the matter.

On June 15, 1993, Beztak of Tri Atria underwent a total restructuring and changed its name to Trident in violation of the letter agreement, which constituted a default under the mortgage. Despite its restructuring, one day before the foreclosure sale was to occur, Beztak of Tri Atria filed an action in Oakland County Circuit Court seeking to enjoin the foreclosure sale. The court denied the motion to enjoin the sale. At 10:09 a.m. on June 22, 1993, the day scheduled for the foreclosure proceedings, Trident filed a Chapter 11 bankruptcy petition. As a result of the filing of the bankruptcy petition, an automatic stay became effective. 11 U.S.C. § 362. The foreclosure sale took place between 10 and 11 a.m. on June 22, 1993, and MetLife was the highest bidder. MetLife bid $19,500,000 for the Tri Atria office complex. On July 15, 1993, the bankruptcy court dismissed the bankruptcy petition for bad faith filing and annulled the automatic stay.

On July 16, 1993, Trident appealed the bankruptcy court's dismissal of its petition. On July 22, 1993, the bankruptcy court entered a consent order modifying an order granting Trident a stay pending appeal, thus the deed was never recorded in MetLife's name. Under the terms of the consent order, PM Realty Group, Ltd. was appointed manager of the property for the benefit of MetLife and Trident. This court affirmed the ruling of the

bankruptcy court. *Trident Assoc. Ltd. Partnership v. Metropolitan Life Ins. Co.*, Slip Op., No. 93-CV-72996 (E.D. Mich. Nov. 19, 1993). On November 22, 1993, just three days after this court affirmed the bankruptcy court's dismissal order, Trident filed its third lawsuit against MetLife in Oakland County Circuit Court seeking a declaratory judgment that the foreclosure sale was a nullity. Trident later voluntarily dismissed that lawsuit on December 15, 1993.

Trident also appealed the bankruptcy court's decision to the Sixth Circuit. While on appeal to the Sixth Circuit, a stay pending appeal remained in effect. The Sixth Circuit also affirmed the dismissal of the bankruptcy petition. *Trident Assoc. Ltd. Partnership v. Metropolitan Life Ins. Co.*, 52 F.3d 127 (6th Cir. 1995). As such, MetLife was free to record its deed to the Tri Atria office building and the 13 acres on which it is located and did so on June 2, 1995. In order to prevent the completion of the foreclosure sale, however, Trident filed this declaratory judgment action. The complaint is nothing more than a transparent attempt to relitigate previously adjudicated issues.

DISCUSSION

A. Plaintiff's motion to remand

Plaintiff Trident has filed a motion to remand the lawsuit. Plaintiff incorrectly argues that diversity jurisdiction does not exist on the basis that the amount in controversy does not exceed the jurisdictional amount. Plaintiff seeks only injunctive relief, not monetary damages. The law is well-settled, however, that the amount in

controversy required for diversity jurisdiction is measured by the value of the subject of the litigation. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 347 (1977); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 181 (1936). The subject of this litigation is the validity of the foreclosure sale of the Tri Atria office complex. It is undisputed that MetLife's bid at the foreclosure sale was $19,500,000. Thus, it is clear that the controversy exceeds the jurisdictional amount.

Trident also argues that this case was improperly removed because it is an allegedly "ancillary proceeding" to the lawsuit MetLife filed against Trident's partners in Oakland County Circuit Court. The parties have agreed to refer to that litigation as the "Guaranty Case." Trident argues that "proceedings ancillary to an action pending in state court cannot be removed." Charles A. Wright & Arthur A. Miller, *Federal Practice and Procedure: Jurisdiction 2d* § 3721 at 202.

The prohibition against the removal of ancillary proceedings is inapplicable here because the Guaranty Case is not ancillary to the instant action. MetLife commenced the Guaranty Case against the guarantors of the Tri Atria loan. Additional claims for wrongful distributions were later asserted against individuals who were either general partners of Trident's predecessor organization or recipients of the distributions. The validity of the foreclosure sale is not an issue in the Guaranty Case. Trident is not a party in that case, and no claim is asserted in that case by or against Trident or its general partner. In sum, the Guaranty Case does not share the required commonality of claims or parties which are necessary to find that it is

an "ancillary proceeding." Thus, remand based upon the existence of the Guaranty Case would be inappropriate.

Finally, plaintiff argues that even if the lawsuit is not remanded, it should be stayed pursuant to the *Colorado River* doctrine because an allegedly "parallel" state proceeding is pending in state court. The *Colorado River* doctrine was set forth by the Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). That case allowed federal courts to abstain from deciding a federal court action in deference to a pending state proceeding in certain extraordinary circumstances. It is a doctrine of judicial economy designed to prevent duplicative litigation. Having already determined that the Guaranty Case is *not* an ancillary proceeding to this lawsuit, there is no role for the application of the *Colorado River* doctrine. Furthermore, this lawsuit is duplicative of two bankruptcy appeals decided and denied by the federal courts. It would not further the interests of judicial economy to burden yet another forum by remanding this litigation. Because this court has jurisdiction and has once again considered the matter and found it to be without merit, plaintiff's motion to remand is denied.

B. Defendant's motion for summary judgment

Plaintiff argues that the foreclosure sale should be set aside on the grounds that it filed a bankruptcy petition and an automatic stay entered before the foreclosure sale was complete. Plaintiff is correct that if the foreclosure sale was completed in violation of the automatic stay, it would be void and without effect. *Kalb v. Feuerstein*, 308

U.S. 433, 443 (1940). However, the bankruptcy court dismissed the bankruptcy petition for bad faith filing and annulled the automatic stay. An order annulling the automatic stay acts retroactively to allow a foreclosure sale taken subsequent to the filing of the bankruptcy petition to be ratified. *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984). Once an order annulling the automatic stay has been entered, the stay becomes a nullity; the parties are restored to their pre-stay status, and the stay is treated as though it never entered. *Id.* Because the bankruptcy court annulled the automatic stay, the foreclosure sale is allowed to stand and MetLife is permitted to record the deed to complete the foreclosure sale. *In the Matter of Washtenaw Huron Inv. Corp.*, 150 B.R. 31, 36 (E.D. Mich. 1993).

Plaintiff is asking this court to ignore the fact that the bankruptcy court dismissed plaintiff's bankruptcy petition as having been filed in bad faith and annulled the automatic stay. That order has been affirmed by this court and by the Court of Appeals for the Sixth Circuit. This lawsuit is an improper attempt to collaterally attack plaintiff's failed appeal of its dismissed bankruptcy petition. The foreclosure sale, which took place before the bankruptcy petition was filed, is allowed to stand.

Trident also claims that the foreclosure sale was never completed because it notified the sheriff's office of the filing of its bankruptcy petition prior to the sale. In support of this argument, Trident has submitted the affidavit of the deputy sheriff. The deputy sheriff's affidavit does not reference the Tri Atria foreclosure sale at all, but merely identifies the office's general foreclosure procedures. Under those general procedures, if the sheriff is

notified before 11 a.m. that a mortgagor of a property scheduled for sale has filed a bankruptcy petition, he pulls the sheriff's deed without completing the bidding process. The sheriff does not remember if he actually followed that procedure in this case. Furthermore, Trident has submitted no proof that the sheriff pulled the deed in the case of the Tri Atria sale.

MetLife, on the other hand, has submitted proof that the Tri Atria foreclosure sale was in fact completed. MetLife has submitted the affidavit of foreclosure sale witness Nancy Howarth. Howarth's affidavit states that before a foreclosure sale is halted, a verification of the bankruptcy filing must be received. Howarth further testified that she did not receive any such verification prior to the completion of the Tri Atria sale. She further states that if the foreclosure sale was not completed, she would have returned the sheriff's fee. In the case of the Tri Atria foreclosure sale, the sheriff's fee was not returned. MetLife has submitted a copy of the cancelled check and the receipt. MetLife also submitted a photocopy of the sheriff's log book of completed foreclosure sales. It shows that the Tri Atria foreclosure sale was recorded as having been completed. Based upon this evidence, it is clear that the foreclosure sale of the Tri Atria office complex was completed. Trident's unsupported allegations are insufficient to overcome the convincing evidence submitted by MetLife. Therefore, defendant is entitled to summary judgment as a matter of law. Accordingly,

IT IS ORDERED that plaintiff's motion to remand hereby is DENIED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment hereby is GRANTED.

IT IS FURTHER ORDERED that the Notice of Lis Pendens hereby is set aside.

IT IS FURTHER ORDERED that defendant is entitled to costs and attorney fees incurred in defending against this vexatious litigation pursuant to 28 U.S.C. § 1927. In the event that the parties are unable to reach a settlement as to costs and attorney fees owing, defendant is ordered to submit on or before August 21, 1995, affidavit(s) and/or other proof of its costs and attorneys fees incurred in defending against this litigation. Plaintiff shall respond in a brief of not more than 20 pages within 10 days after service of the motion. Defendant may file a reply brief in conformity with the Local Rules of this district.

/s/ Barbara K. Hackett
BARBARA K. HACKETT
United States District Judge

Dated: July 24, 1995.
Detroit, Michigan.